

# How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice\*

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*Before becoming governor of California, Earl Warren had spent his entire legal career, twenty-two years, in law enforcement. Professor Kamisar maintains that this experience significantly influenced Warren's work as a Supreme Court justice and gave him a unique perspective into police interrogation and other police practices. This article discusses some of Warren's experiences in law enforcement and searches for evidence of that experience in Warren's opinions. For example, when Warren was head of the Alameda County District Attorney's Office, he and his deputies not only relied on confessions in many homicide cases but also themselves interrogated homicide suspects. The seeds of the Miranda v. Arizona opinion may well have been Warren's own keen awareness of the opportunities for coercion and exploitation of confusion in the custodial interrogation setting.*

*Moreover, when district attorney, Warren sought to "professionalize" the police, as well as the prosecutors in his own office. His belief that well-trained law enforcement officials could satisfy the most demanding standards also helps explain his Miranda opinion. Warren's critics viewed his Court's criminal procedure rulings as "handcuffing" the police, but as has been noted by one of Warren's biographers (and former law clerks), G. Edward White, the Chief Justice was convinced that his rulings were not hampering law enforcement, but "ennobling" it.*

Many critics of the Warren Court's "revolution" in American criminal procedure led the public to believe that Earl Warren and his colleagues were unworldly creatures who failed to grasp (and had no interest in grasping) the harm their rulings were inflicting on law enforcement. In Earl Warren's case, nothing could be further from the truth.

Before becoming governor of California, Warren had spent twenty-two years in law enforcement: five as a deputy district attorney (1920–25), thirteen as head of the Alameda County District Attorney's Office (1925–38), and four as state

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attorney general (1939–42). So far as I can tell, Warren had a more extensive background in law enforcement than anyone who has ever sat on the United States Supreme Court.

Unlike his colleagues on the Supreme Court, Warren had actually interrogated murder suspects. He knew firsthand how the police obtained confessions. To defend the confession he had taken from a murder suspect in the *Point Lobos* case (a famous California case in the 1930s), Warren had twice taken the witness stand and twice endured cross-examination by the defense.<sup>1</sup> Although he voted with the majority in *Mapp v. Ohio*<sup>2</sup> to impose the search and seizure exclusionary rule on state courts as a matter of Fourteenth Amendment due process, Warren knew all the arguments for *admitting* illegally seized evidence in criminal cases. As Attorney General of California, he and his staff had persuaded the state supreme court to do just that in 1942.<sup>3</sup>

As district attorney of Alameda County, the third largest county in the state, Warren was constantly trying to “professionalize” the police as well as his own deputies. After many unsuccessful attempts, he finally persuaded California colleges to offer criminology courses and other police training programs.<sup>4</sup> When he learned that one of his own undercover agents had perjured himself in a criminal prosecution, he personally prosecuted him.<sup>5</sup>

Warren’s deputy district attorneys were so hard-working and so determined to avoid any trickiness or any unfairness in dealing with defendants that they earned a reputation around the courthouse as the “Boy Scouts.”<sup>6</sup> His office had a higher conviction rate than the great majority of district attorney offices in the state and none of the convictions his office obtained were ever reversed on appeal.<sup>7</sup> In 1931, Columbia University’s Raymond Moley (a well-known professor at the time and later a prominent journalist) concluded, after a national survey, that Alameda

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<sup>1</sup> ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 88 (1997).

<sup>2</sup> 367 U.S. 643 (1961).

<sup>3</sup> *People v. Gonzales*, 124 P.2d 44 (Cal. 1942).

<sup>4</sup> See CRAY, *supra* note 1, at 68; G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 30–32 (1982); see also JOHN D. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 95, 237 (1967).

<sup>5</sup> See CRAY, *supra* note 1, at 58.

<sup>6</sup> See *id.* at 48; WHITE, *supra* note 4, at 30. Perhaps the best example of Warren’s restraint in pursuing suspected criminals is how he handled a murder case in his non-official capacity. In his last year as district attorney, in the midst of his primary campaign for state attorney general (Warren was to capture both the Republican and Progressive nominations), his father, Matt, was robbed and murdered. Eventually the police developed a lead: A young man recently incarcerated for a string of assaults and robberies might be the killer. The chief of police investigating the case suggested they plant a “stool pigeon” and an eavesdropping device in the suspect’s cell. Warren refused to go along with the idea. He told the police chief firmly that he did not believe in such methods. The police chief was surprised by Warren’s reaction, but he scrapped his plan. The murder of Matt Warren was never solved. See CRAY, *supra* note 1, at 94–96; BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT 11–12 (1983).

<sup>7</sup> See WEAVER, *supra* note 4, at 13, 42.

County had in Warren "the most intelligent and politically independent district attorney in the United States."<sup>8</sup>

My thesis is that, in the criminal procedure field at least, Warren's many years in law enforcement significantly affected his work as Chief Justice of the United States. Some examples follow.

### I. *HOFFA V. UNITED STATES*<sup>9</sup>

In 1966, the Supreme Court affirmed the conviction of Jimmy Hoffa for trying to bribe members of a jury during the so-called Test Fleet trial.<sup>10</sup> The government had relied heavily on the testimony of an "informer," a union official named Edward Partin. Few people lost any sleep over the Court's ruling because Hoffa was considered "the nation's most notorious labor racketeer."<sup>11</sup>

The *Hoffa* majority devoted most of its opinion to a discussion and rejection of Hoffa's Fourth, Fifth and Sixth Amendment contentions. At the end, the Court made short shrift of the contention that, even though the government may not have violated any specific provision of the Constitution, the "totality" of its conduct—especially its use of so untrustworthy an informer as Mr. Partin—violated due process. The majority conceded that "perhaps even more than most informers," Partin "may have had motives to lie."<sup>12</sup> But "the established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination" and Partin had been subjected to "rigorous cross-examination."<sup>13</sup>

Chief Justice Warren was the lone dissenter.<sup>14</sup> And he dissented on a ground the majority did not even discuss. According to Warren, "the affront to the quality and fairness of federal law enforcement which this case presents is sufficient to [overturn the conviction with the] exercise of our supervisory powers [over federal criminal justice]."<sup>15</sup>

Here, Edward Partin, a jailbird languishing in a Louisiana jail under indictments for such state and federal crimes as embezzlement, kidnapping, and manslaughter (and soon to be charged with perjury and assault), contacted federal authorities and told them he was willing to become, and would be useful as, an informer against Hoffa who was then

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<sup>8</sup> See CRAY, *supra* note 1, at 60–61; SCHWARTZ, *supra* note 6, at 12; WEAVER, *supra* note 4, at 44.

<sup>9</sup> 385 U.S. 293 (1966).

<sup>10</sup> *Id.* at 294.

<sup>11</sup> See CRAY, *supra* note 1, at 508.

<sup>12</sup> *Hoffa*, 385 U.S. at 311.

<sup>13</sup> *Id.*

<sup>14</sup> Justice Clark, joined by Justice Douglas, would have dismissed the writ of certiorari as improvidently granted. *Id.* at 321.

<sup>15</sup> *Id.* at 320 (Warren, C.J., dissenting).

about to be tried in the Test Fleet case. A motive for his doing this is immediately apparent—namely, his strong desire to work his way out of jail and out of his various legal entanglements with the State and Federal Governments. And it is interesting to note that, if this was his motive, he has been uniquely successful in satisfying it. In the four years since he first volunteered to be an informer against Hoffa he has not been prosecuted on any of the serious federal charges for which he was at that time jailed, and the state charges have apparently vanished into thin air.<sup>16</sup>

Given the incentives and background of Partin, no conviction should be allowed to stand when based heavily on his testimony. And that is exactly the quicksand upon which these convictions rest . . . .<sup>17</sup>

I do not say that the Government may never use as a witness a person of dubious or even bad character. In performing its duty to prosecute crime the Government must take the witnesses as it finds them . . . . [But here] the Government reaches into the jailhouse to employ a man who was himself facing indictments far more serious (and later including one for perjury) than the one confronting the man against whom he offered to inform. It employed him not for the purpose of testifying to something that had already happened, but rather for the purpose of infiltration to see if crimes would in the future be committed . . . . And, for the dubious evidence thus obtained, the Government paid an enormous price.<sup>18</sup>

I think the root from which Warren drew the juices of indignation in the *Hoffa* case was an incident that occurred while he was a prosecuting attorney. In his very first criminal case as a member of the Alameda County District Attorney's Office, Warren assisted a senior deputy attorney in the prosecution of someone for "criminal syndicalism." (The defendant was a "Wobbly," as members of the militant Industrial Workers of the World were called.) Warren felt uneasy about the use of the three informers in the case: a convicted burglar and a draft dodger; a military deserter; and an admitted embezzler. "The three informers, already well practiced, would testify repeatedly up and down the state, becoming no more than professional witnesses for the prosecution."<sup>19</sup> Years later, Warren called the three informers "repulsive." He thought that convictions based on the testimony of such persons were likely to result in miscarriages of justice.<sup>20</sup>

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<sup>16</sup> *Id.* at 317–18 (internal citation omitted).

<sup>17</sup> *Id.* at 320.

<sup>18</sup> *Id.* at 320–21.

<sup>19</sup> See CRAY, *supra* note 1, at 39.

<sup>20</sup> *Id.* Some years later, when Warren, now the head of the Alameda County District Attorney's Office, discovered that one of his own undercover agents had perjured himself in order to gain a conviction in a bootleg case, he personally prosecuted the man. See *id.* at 58.

As the extract from his dissenting opinion in the *Hoffa* case illustrates, Warren's writing was direct and crisp. No doubt the fact that he had spoken to many juries and had been an indefatigable campaigner for whatever political office he had sought had something to do with it. Commenting on Warren's first campaign for governor, one of his biographers observed: "No one had ever traveled so many miles, talked to so many voters, and, afterwards, remembered so many of their names."<sup>21</sup>

Another factor that undoubtedly contributed to Warren's writing style was that between political campaigns he spent a great deal of time talking in plain English to various civic organizations. Again, to quote one of his biographers, "Day after day, night after night, he talked to Lions and Rotarians, Soroptimists and the Council of Jewish Women, and to fellow members of the Exchange Club, American Legion, Elks, Native Sons [of the Golden West] and Moose, striking variations on the theme of crime and punishment."<sup>22</sup>

Although he may not have been familiar with the term, I believe Warren was a practitioner of what some have called "fact advocacy." I use this term to mean that the presentation of facts is given in such a compelling way that the decision-maker is led to say: "Yes, I want to come out on your side. Now, how do I go about writing the opinion?"

Sometimes, as in *Hoffa*, Warren's "fact advocacy" failed. Many other times it succeeded. For a success story some might point to landmark cases requiring desegregation and reapportionment of state legislatures—*Brown v. Board of Education*<sup>23</sup> and *Reynolds v. Sims*.<sup>24</sup> A lesser known confession case, *Spano v. New York*,<sup>25</sup> likely also required quite a bit of advocacy to persuade a majority that the confession was coerced by relatively mild police interrogation.<sup>26</sup>

But I turn instead to a case that few students of the Court have ever heard of.

## II. *BROOKS V. FLORIDA*

The case I have in mind (actually a group of cases) is called *Brooks v. Florida*.<sup>27</sup> After a riot in a Florida state prison had ended, thirteen of the alleged culprits were taken into custody, brutally treated for weeks, and then "persuaded" to sign a written confession to felonious riot. As a result, they were convicted of felonious riot and sentenced to many years of additional time to be served after their current prison terms were completed.<sup>28</sup>

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<sup>21</sup> See WEAVER, *supra* note 4, at 100.

<sup>22</sup> *Id.* at 46; see also CRAY, *supra* note 1, at 69–70.

<sup>23</sup> 347 U.S. 483 (1954).

<sup>24</sup> 377 U.S. 533 (1964).

<sup>25</sup> 360 U.S. 315 (1959).

<sup>26</sup> *Id.*

<sup>27</sup> 389 U.S. 413 (1967).

<sup>28</sup> See Tyrone Brown, *Clerking for the Chief Justice*, in THE WARREN COURT: A

Anybody who had known Earl Warren when he was a district attorney would know that he would not let this case slip by. As a district attorney, Warren had tried to persuade the new sheriff to open a prison farm for nonviolent prisoners and alleviate crowding in the county jail.<sup>29</sup> More generally, he had strongly criticized the prison system: People were coming out of prison more bitter toward society and more inclined to engage in criminal behavior, he protested, than when they entered prison. We could not expect anything better as long as we "cage[d] up men like animals."<sup>30</sup>

Although Warren was quite interested in the Florida prison cases, most of his colleagues were not. Probably because of a traditional reluctance to get involved in internal prison discipline matters, it seemed clear that the Court was going to decline review.

Warren decided to write a dissent. He asked one of his law clerks to draft a short statement. The clerk did, but failed to say much about the sordid facts. Warren was not happy with the draft. According to the clerk, Tyrone Brown, Warren called him into his office and said:

Let's tell them what really happened. Tell them that the authorities placed these men in threes in tiny sweat boxes for two weeks, naked and on a starvation diet with just a hole in the floor to defecate. Tell them that they brought these men out, still naked, and forced written confessions from them! Tell them what really happened . . . in plain language. Put it in those books [pointing to the bound volumes of United States Reports] and let posterity decide who was right!<sup>31</sup>

The clerk did as told. Warren circulated his dissent from the denial of review. The word started coming back that one or two justices were joining Warren's dissent. When the prison case came up for discussion at the justices' weekly conference, all the justices had joined Warren. His dissent had become a *per curiam* opinion ordering summary reversal of the convictions.<sup>32</sup> Now that's fact advocacy!

The *per curiam* opinion consisted largely of the same plain statement of the facts that had appeared earlier in Warren's draft dissent. However, perhaps to shame the Florida courts, which had been unperturbed by the harsh facts, the Court's *per curiam* opinion contained a brief "editorial comment": "The record in this case documents a shocking display of barbarism which should not escape the remedial action of this Court."<sup>33</sup>

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RETROSPECTIVE 276, 279–80 (Bernard Schwartz ed., 1996).

<sup>29</sup> See CRAY, *supra* note 1, at 68.

<sup>30</sup> See WEAVER, *supra* note 4, at 46.

<sup>31</sup> Brown, *supra* note 28, at 280.

<sup>32</sup> See *id.*

<sup>33</sup> Brooks, 389 U.S. at 415.

III. *MAPP V. OHIO*

The famous *Mapp*<sup>34</sup> case has to be discussed against the background of *Wolf v. Colorado*.<sup>35</sup> Although the *Wolf* Court recognized that “[t]he security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society” and thus “enforceable against the States through the Due Process Clause,”<sup>36</sup> it went on to say that “the ways of enforcing such a basic right” should be left to the states.<sup>37</sup> Therefore, the states were free to exclude the illegally seized evidence or to admit it—and to rely on tort actions or criminal prosecutions against the offending officers or on “such protection as the internal discipline of the police . . . may afford.”<sup>38</sup>

*Wolf* did not remain on the books for very long. A decade later, *Mapp* reached the Supreme Court. Dolly Mapp had been convicted of possessing obscene materials. At first, everybody thought the issue presented was not whether *Wolf* should be overruled, but whether the Ohio obscenity-possession statute was unconstitutionally vague. However, things soon took a dramatic turn.

Justice William Douglas, who had dissented in *Wolf*, was the first to throw out the idea that *Wolf* should be overruled. Chief Justice Warren and Justice Brennan quickly agreed. But nobody else supported this position. As a result, the vote in conference was to overturn Miss Mapp’s conviction on First Amendment grounds.<sup>39</sup>

After the conference, however, Justice Tom Clark had a change of heart. He was prepared to overrule *Wolf*. The foursome still needed a fifth vote—and Justice Hugo Black was the best bet. Together, the Chief Justice and Justices Douglas and Brennan visited Black in his chambers—and persuaded him to come aboard.<sup>40</sup>

One might say that when the meeting in Justice Black’s chambers ended that day—and not until then—the Warren Court’s “revolution” in American criminal procedure got underway.<sup>41</sup>

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<sup>34</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>35</sup> 338 U.S. 25 (1949).

<sup>36</sup> *Id.* at 27–28.

<sup>37</sup> *Id.* at 28, 33.

<sup>38</sup> *Id.* at 31.

<sup>39</sup> See CRAY, *supra* note 1, at 374.

<sup>40</sup> See *id.* at 375. In order to hold Justice Black’s vote, Justice Clark, who was assigned the opinion in *Mapp*, had to humor Black, who believed that the basis for the search and seizure exclusionary rule was the Fifth Amendment privilege against self-incrimination. Therefore, some segments of Clark’s opinion purport to take seriously Black’s rationale for the exclusionary rule. Professor Lucas Powe, a commentator who rarely uses strong words, calls Black’s theory “preposterous.” LUCAS POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS 196–97* (2000). I would not go that far, but Black’s theory is badly flawed and, so far as I can tell, almost nobody subscribes to it today.

<sup>41</sup> I share Professor Francis Allen’s view that it was “not until 1961 and the decision of *Mapp v. Ohio* that a majority of the [Supreme Court] began consistently to reflect those positions [in the

As noted earlier,<sup>42</sup> in 1942 Earl Warren and his staff had persuaded the California Supreme Court to reaffirm its position that illegally seized evidence could be used in criminal prosecutions. However, shortly after Warren had become Chief Justice of the United States, the California Supreme Court, in a famous case called *People v. Cahan*,<sup>43</sup> had overruled that precedent and adopted the exclusionary rule. By 1955, it had become apparent to Chief Justice Roger Traynor, author of the *Cahan* opinion, that, "without fear of criminal punishment or other discipline, [California] law enforcement officers . . . casually regard [illegal searches and seizures] as nothing more than the performance of their ordinary duties for which the city employs and pays them."<sup>44</sup>

Traynor wrote an outstanding opinion that was widely read. The odds are high that Warren had studied it with considerable care. As district attorney, Warren had kept in close touch with the police. He must have known that Traynor's criticism of the police was well-founded.

At the time of the *Cahan* decision, Traynor was widely regarded as the most respected state judge in America.<sup>45</sup> Moreover, Warren knew Traynor personally and, on the basis of his own dealings with Traynor, respected him. When Warren had been state attorney general, then Professor Traynor had been brought into Warren's office to organize a new tax division and to take charge of tax litigation.<sup>46</sup> In addition, as a member of California's three-person Judicial Qualifications Commission, Warren had approved Traynor's nomination to the state supreme court.<sup>47</sup>

If Traynor's careful, thorough and powerful opinion in the *Cahan* case was not sufficient reason for Warren to vote for imposing the exclusionary rule on the states as a matter of federal constitutional law, the kind of criticism the *Cahan*

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criminal procedure field] that one today considers distinctive of the Warren Court." Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 519; see also POWE, JR., *supra* note 40, at 195-98.

<sup>42</sup> See *supra* text accompanying note 3.

<sup>43</sup> 282 P.2d 905 (Cal. 1955).

<sup>44</sup> *Id.* at 907. As he explained some years later:

My misgivings about [the admissibility of illegally seized evidence] grew as I observed that time after time it was being offered and admitted as a routine procedure. . . .

It is seriously misleading . . . to suggest that wholesale release of the guilty is a consequence of the exclusionary rule. It is a large assumption that the police have invariably exhausted the possibilities of obtaining evidence legally when they have relied upon illegally obtained evidence. It is more rational to assume the opposite when the offer of illegally obtained evidence becomes routine.

Roger Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 321-22.

<sup>45</sup> See POWE, JR., *supra* note 40, at 199; see also Walter V. Schaefer, *Chief Justice Traynor and the Judicial Process*, 53 CAL. L. REV. 11, 24 (1965).

<sup>46</sup> See WEAVER, *supra* note 4, at 74.

<sup>47</sup> See *id.* at 73-74.



decision had been receiving from California law enforcement officials probably was. The leading critic of the ruling, Los Angeles Police Chief William Parker, had reacted to *Cahan* as if the guarantee against unreasonable search and seizure had just been written. He voiced concern that the commission of a criminal offense would no longer “justify affirmative action until such time as the police have armed themselves with sufficient information to constitute probable cause.”<sup>48</sup> He did promise to work “within the framework of limitations” imposed by the law of search and seizure “[a]s long as the Exclusionary Rule is the law of California.”<sup>49</sup> Any hope that the California law would change soon was of course dashed by the Court’s decision in *Mapp*.

Although Warren’s many years in law enforcement affected his thinking as a member of the United States Supreme Court, he did not stop thinking and learning once he ascended to the High Court. *Irvine v. California*<sup>50</sup> and that case’s aftermath must have made an indelible impression on him. Indeed, *Irvine* set the stage for *Mapp* because it showed Warren, and the other members of the *Mapp* majority, the true costs of permitting the states to ignore the exclusionary rule.

In *Irvine*, Long Beach police officers twice illegally entered a suspected bookmaker’s home, first to install a secret microphone and then to move it to the bedroom, in order to listen to the conversations of the occupants—for over a month. Justice Jackson, who wrote the principal opinion, recognized that “[f]ew police measures have come to our attention that more flagrantly, deliberately and persistently violated the fundamental principle declared by the Fourth Amendment.”<sup>51</sup> Nevertheless, he adhered to the holdings in *Wolf* that the exclusionary rule that applied in the federal courts was not binding on the states.

Speaking for four members of the Court,<sup>52</sup> including himself and the new Chief Justice (Warren had only been on the job for a few months), Justice Jackson pointed out that the police officers involved may have committed a federal crime and expressed the belief that “the Clerk of this Court should be directed to forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General of the United States.”<sup>53</sup> I believe this made it a good deal easier for Warren to vote with Jackson. But the results of the investigation of the incident must have shaken Warren—and made him readier to support a believer in the exclusionary rule.

It turned out that the police officers who had hidden the microphone in Irvine’s home had been acting under the order of the local chief of police and with the full knowledge of the local prosecutor. Thus, concluded the Justice

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<sup>48</sup> WILLIAM H. PARKER, PARKER ON POLICE 117 (O.W. Wilson ed., 1957).

<sup>49</sup> *Id.* at 131 (emphasis added).

<sup>50</sup> 347 U.S. 128 (1954) (plurality opinion).

<sup>51</sup> *Id.* at 132.

<sup>52</sup> Justice Clark concurred in the judgment, thus creating a majority to affirm the conviction.

<sup>53</sup> *Irvine*, 347 U.S. at 138.

Department, "it would be both useless and inadvisable to present [the] matter to the Federal grand jury."<sup>54</sup>

According to one of Warren's biographers, later in his career Warren repeatedly told the story of the *Irvine* case.<sup>55</sup> One of the lessons he drew from that case and its aftermath was that the Court could not rely on alternative remedies to the exclusionary rule.<sup>56</sup>

#### IV. *GIDEON V. WAINWRIGHT*

That Chief Justice Warren was a strong proponent of an indigent defendant's right to appointed counsel is hardly surprising. When the Alameda County Charter was written in 1927, it was District Attorney Earl Warren who insisted that it provide for a public defender.<sup>57</sup> When the newly appointed public defender—who had no investigators on his staff—believed a defendant was innocent, he would go to District Attorney Warren, who would disclose "all the facts we have on him."<sup>58</sup> If the public defender still believed the defendant was innocent, they would go together to the judge and dismiss the charges.<sup>59</sup> Warren felt so strongly about the right to counsel that he took an active role in founding the Bay Area Legal Aid Society in order to provide lawyers in civil cases for those who could not afford them.<sup>60</sup>

Prior to *Gideon*,<sup>61</sup> most states provided indigent defendants with assigned counsel in all serious criminal cases as a matter of state law. But some states did not require the appointment of counsel if the defendant was not charged with a capital offense. In those states the federal constitution's Sixth Amendment right to counsel did not provide much help. It only required counsel for those who could not afford it in federal criminal prosecutions.

In non-capital state criminal prosecutions the federal constitutional rule that governed state prosecutions (until it was overturned by *Gideon*) was the *Betts* rule<sup>62</sup> or the "special circumstances" rule. Under this rule, an indigent person charged with a serious non-capital offense (even armed robbery or arson or

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<sup>54</sup> See Note, *State Police, Unconstitutionally Obtained Evidence and Section 242 of the Civil Rights Statute*, 7 STAN. L. REV. 76, 94 n.75 (1954). The Justice Department official who had reached this conclusion was Warren Olney, III, the assistant attorney general in charge of the criminal division. Olney was one of Warren's former deputies and one of his closest friends. See CRAY, *supra* note 1, at 181, 270–71; WEAVER, *supra* note 4, at 196, 198; WHITE, *supra* note 4, at 97–98.

<sup>55</sup> See WHITE, *supra* note 4, at 266.

<sup>56</sup> See *id.*; see also CRAY, *supra* note 1, at 374.

<sup>57</sup> SCHWARTZ, *supra* note 6, at 10.

<sup>58</sup> See CRAY, *supra* note 1, at 60.

<sup>59</sup> See *id.*

<sup>60</sup> See *id.* at 67.

<sup>61</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>62</sup> *Betts v. Brady*, 316 U.S. 455 (1942).

attempted murder) was not entitled to the appointment of counsel absent "special circumstances," e.g., an illiterate or mentally disabled defendant or an unusually complicated case.<sup>63</sup>

Unfortunately, in practice the courts in the states that followed the "special circumstances" rule rarely, if ever, bothered to find out whether the circumstances were "special."<sup>64</sup> In the *Gideon* case itself, when Clarence Gideon the defendant, charged with burglary, asked the trial judge to appoint counsel for him, the judge responded that he could not do so because "under the laws of the State of Florida, the only time the Court can appoint counsel . . . is when [the defendant] is charged with a capital offense."<sup>65</sup> So much for the touted "fluidity" and "flexibility" of the old *Betts* rule.<sup>66</sup>

According to one of his biographers,<sup>67</sup> Warren had instructed his clerks to look for a right-to-counsel case that would serve as a vehicle for abolishing the *Betts* "special circumstances" rule.<sup>68</sup> When the Court granted Clarence Gideon's *in forma pauperis* petition, written in pencil, Warren must have been sorely tempted to assign the case to himself. But Justice Black had written a powerful dissent twenty years earlier in *Betts*, the case *Gideon* was to overrule. So the Chief let Black convert his old dissent into the opinion of the Court.

Justice Black also knew a thing or two about writing powerful prose in plain English. As he observed in *Gideon*:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the

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<sup>63</sup> See generally Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962).

<sup>64</sup> Moreover, how often could an untrained and relatively uneducated person explain—without a lawyer—why his case was so complicated that he needed a lawyer?

<sup>65</sup> *Gideon*, 372 U.S. at 337 (emphasis added).

<sup>66</sup> See *Betts*, 316 U.S. at 462, 473.

<sup>67</sup> See SCHWARTZ, *supra* note 6, at 408, 458.

<sup>68</sup> Although one of the Chief's clerks, Henry Steinman, denied Schwartz's assertion that Warren had issued instructions to his clerks to look for a case to overrule *Betts*, see CRAY, *supra* note 1, at 564 n.404, Steinman's own account of his reaction to Gideon's petition supports Schwartz's version of what happened. According to Steinman, when he came upon Gideon's petition, he became excited because this one was "clean," i.e., there were no "extenuating circumstances" that prevented a direct re-examination of the *Betts* rule. According to Steinman, he wrote to the Chief "[t]his [case] may be it!" See *id.* at 404.

widespread belief that lawyers in criminal courts are necessities, not luxuries.<sup>69</sup>

Although Warren did not write the opinion of the Court in *Gideon*, he worked hard on producing a unanimous Court in *Gideon*. One of the ways he did so was by proposing that the justices “leave to another day and other decisions” whether *Gideon* applied to misdemeanors or to second appeals or how early it applied. The fewer the peripheral issues the better.<sup>70</sup> The Court was unanimous.<sup>71</sup> Even Justice Harlan, who opposed much of the Warren Court’s criminal procedure revolution, joined Black’s opinion, though he wrote separately to lament Black’s failure to provide *Betts* “a more respectful burial.”<sup>72</sup>

It is hard to understand why *Gideon* was decided so late in the day—why, for example, it was decided two years after the *Mapp* case. The most important and the most obvious goal of criminal procedural due process is insuring the reliability of the guilt-determining process. The master key to all the rules and procedures designed to achieve this objective is the right to counsel. So why was *Mapp* handed down before *Gideon*? To be sure, it is important to effectuate the prohibition against unreasonable search and seizure. But the exclusionary rule does not contribute to the reliability of the guilt-determining process. *Gideon* does.

Moreover, at the time of *Mapp*, the states were split about 50-50 on whether to exclude illegally seized evidence.<sup>73</sup> At the time of *Gideon*, however, the great majority of states provided indigent defendants with counsel in all felony cases.<sup>74</sup>

One explanation may be that although the Court had decided to review a number of cases in the 1950s where indigent defendants had not been provided counsel, perhaps with an eye to overturning *Betts* and establishing a *Gideon*-type rule, it had always wound up concluding that “special circumstances” were present—circumstances that entitled the indigent defendant to appointed counsel even under the old *Betts* rule.<sup>75</sup> In *Gideon*, however, there appeared to be no

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<sup>69</sup> 372 U.S. at 344. *Gideon* established an automatic or unqualified right to appointed counsel in all felony cases. Some years later, *Gideon* was applied to misdemeanors, even petty offenses, so long as the indigent defendant was incarcerated for as much as one day. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972). But cf. *Scott v. Illinois*, 440 U.S. 367 (1979) (refusing to require counsel when no jail time resulted even though authorized penalty was up to one year in jail).

<sup>70</sup> See CRAY, *supra* note 1, at 405.

<sup>71</sup> Justice Clark concurred in the result, in an opinion that seems to accept the logic as well as the rationale of the majority. See *Gideon*, 372 U.S. at 347–49. Why he concurred only in the result is a puzzle.

<sup>72</sup> *Id.* at 349 (Harlan, J., concurring).

<sup>73</sup> See *Elkins v. United States*, 364 U.S. 207, 219, 224–26 (1960).

<sup>74</sup> See generally Kamisar, *supra* note 63.

<sup>75</sup> See *Gideon*, 372 U.S. 350–51 (Harlan, J., concurring).

special circumstances.<sup>76</sup> Thus, the question whether to overrule *Betts* was squarely presented.

It should also be kept in mind that, as noted earlier, the Court did not grant certiorari in *Mapp* to decide the Fourth Amendment question. Therefore, it may have been merely fortuitous that *Mapp* preceded *Gideon*.

I believe *Gideon* is the only Warren Court criminal procedure ruling in favor of the defense that met widespread applause. What accounts for its popularity?

A leading commentator, Francis Allen, maintains that *Gideon* was warmly received by the public because it was “supported by a broad ethical consensus.”<sup>77</sup> There is something to that, but I think other factors may have played a larger role.

Our sense of injustice thrives on visibility. We don’t see the confused and frightened suspect being “grilled,” or at least being nagged or pressured, in the backroom of a police station. We don’t see the individual being arrested or searched illegally in a back street or alley. But in the courts of those states which did not regularly provide indigent defendants with lawyers in the days before *Gideon*, we could walk into a public courtroom and see untrained and often uneducated persons trying to defend themselves as best they could. That made a highly visible and disconcerting spectacle.

Another thing: The criticism that search and seizure and confession cases “second guess” police officers who have to make quick decisions about issues that divide the courts does have a certain force. But this criticism has no application to the appointment of counsel at arraignment, trial, or appeal.

*Gideon* did not affect the police directly. It was about lawyers in the courtroom. To be sure, in a very few years, the Court did apply the “*Gideon* principle” to the police station. But that was when a great many people lost their enthusiasm for the “*Gideon* principle.”

#### V. *MIRANDA V. ARIZONA*

In the course of throwing out a coerced confession in *Spano v. New York*, Chief Justice Warren observed that “[t]he abhorrence of society to the use of involuntary confessions” turns in part on “the deep-rooted feeling that the police must obey the law while enforcing the law.”<sup>78</sup> According to some of his former deputies, Warren used to say exactly the same thing to them all the time.<sup>79</sup>

The 1930s was the era of the third degree. Nevertheless, District Attorney Warren’s long-time chief investigator, Oscar Jahnsen, remembers his boss telling him: “Be fair to everyone, even if they are breaking the law. Intelligence and proper handling can get confessions quicker than force.”<sup>80</sup>

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<sup>76</sup> See *supra* text accompanying note 68.

<sup>77</sup> See Allen, *supra* note 41, at 540.

<sup>78</sup> 360 U.S. 315, 320 (1959).

<sup>79</sup> See WEAVER, *supra* note 4, at 237.

<sup>80</sup> SCHWARTZ, *supra* note 6, at 11.

There is some disagreement about how District Attorney Warren and his deputies conducted themselves when they questioned custodial suspects. One view is that his deputies behaved extremely well, convincing Warren that law enforcement interrogators (Warren often used deputy prosecutors, not police officers) could satisfy high standards. Another view is that, on a few occasions at least, Warren and his men walked the line of unethical conduct and that these incidents haunted him and led him, as Chief Justice, to closely scrutinize law enforcement conduct in confession cases.<sup>81</sup> There seems to be general agreement, however, that as a result of his experiences as a prosecuting attorney, "[t]he feature of the criminal justice system that aroused Warren's strongest emotions was the confession made during incarceration."<sup>82</sup>

J. Frank Coakley, a former Warren deputy district attorney and Warren's successor as head of the Alameda County District Attorney's Office, has suggested that the seeds of Warren's *Miranda* opinion may have been his "own understanding of the decisive imbalance between a competent, prepared, indefatigable prosecutorial force and an isolated suspect."<sup>83</sup> Warren's own experiences as a prosecutor and an interrogator, continued Coakley, may have made him keenly aware of the opportunities for coercion in the custodial setting. Perhaps the best one can do is to say (as G. Edward White has) that—

[s]eeing law enforcement from the perspective of Chief Justice of the United States meant, for Warren, seeing the gap between an unequal, potentially coercive existing system and the ideal of a truly enlightened law enforcement apparatus, where officials pursued and prosecuted criminals with vigor but with honor and equanimity. This perspective led Warren simultaneously to idealize his years as an agent of law enforcement—thereby hazing over the times when he may have bent laws or ethics for his own purposes—and to recall the power of the police and the prosecutor with a vivid clarity. . . . The idealized vision and the harsh memories of his law enforcement years fused to create in Warren a powerful impetus to restrain unethical conduct.<sup>84</sup>

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<sup>81</sup> See CRAY, *supra* note 1, at 458, 461–62; WHITE, *supra* note 4, at 266–76. Professor G. Edward White, a former law clerk to Warren and, for the most part, an admirer of his, notes that in District Attorney Warren's most famous murder case (the 1937 *Point Lobos* case), Warren and his deputies "had walked the line of unethical official conduct": They had questioned one murder suspect for five and a half hours without an attorney present, denied him access to an attorney, and kept him in continuous custody without sleep for some twenty hours. WHITE, *supra* note 4, at 266–67. Warren denied that he or his men had acted illegally or unethically. To defend the confession he had taken from the murder suspect, "Warren twice put himself on the witness stand and twice endured cross-examination by the defense." See CRAY, *supra* note 1, at 88.

<sup>82</sup> WHITE, *supra* note 4, at 266.

<sup>83</sup> *Id.* at 272.

<sup>84</sup> *Id.* at 277–78; see also *id.* at 276 ("Confessions were the classic example of a solitary citizen confronted with the coercive power of law enforcement. Warren wanted that power exercised in a way that vindicated his ideal of the American system of criminal justice.").

Another factor probably influenced Chief Justice Warren—that so many of the coerced confession cases “were appeals from southern courts, and so many of the defendants powerless blacks cast them as de facto civil rights cases.”<sup>85</sup> In fact, an early draft of the Chief’s *Miranda*<sup>86</sup> opinion contained the following passage:

In a series of cases decided by this Court long after [studies of the third degree and other interrogation abuses], Negro defendants were subject to physical brutality—beatings, hanging, whipping—employed to extort confessions. In 1947, the President’s Committee on Civil Rights probed further into police violence upon minority groups. The files of the Justice Department, in the words of the Committee, abounded “with evidence of illegal official action in southern states.”<sup>87</sup>

However, in a memo to Warren, Justice Brennan questioned whether “it is appropriate in this context to turn police brutality into a racial problem. If anything characterizes the group this opinion concerns it is poverty more than race.”<sup>88</sup> Warren responded by deleting the reference to blacks and the South.<sup>89</sup>

As noted earlier,<sup>90</sup> Warren was a strong proponent of selecting high quality police recruits and training them well. He was confident that professional police officers could satisfy the more demanding standards the Supreme Court was requiring. Despite his critics’ claims that he and his colleagues were freeing too many criminals and threatening public safety, Warren viewed the Court’s ruling as enlightening law enforcement and encouraging the police to work harder and to prepare their cases more carefully and thoroughly.<sup>91</sup> As Warren saw it, he and his colleagues were not hampering law enforcement but “ennobling” it.<sup>92</sup>

Bernard Schwartz quotes Justice Abe Fortas (a member of the 5-4 *Miranda* majority) to the effect that the *Miranda* decision was “entirely” Warren’s.<sup>93</sup> At a conference held some two months before the *Miranda* decision was handed down, Warren maintained that as a district attorney he and his staff had given suspects warnings similar to those he was urging the Court to adopt.<sup>94</sup> And he emphasized

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<sup>85</sup> See CRAY, *supra* note 1, at 462.

<sup>86</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>87</sup> SCHWARTZ, *supra* note 6, at 591.

<sup>88</sup> *Id.*

<sup>89</sup> See *id.*

<sup>90</sup> See *supra* text accompanying note 4.

<sup>91</sup> See WHITE, *supra* note 4, at 272, 277–78.

<sup>92</sup> See *id.* at 275.

<sup>93</sup> SCHWARTZ, *supra* note 6, at 589.

<sup>94</sup> *Id.* This is hard to believe. If Warren and his deputies gave what was essentially the *Miranda* warnings in the 1930s they must have been the only law enforcement officers in America doing so. However, Warren and his staff may have given one or two of the *Miranda* warnings, such as the warning that any statement a suspect makes may be used against him in a court.

that the “standard” FBI warnings covered the essential requirements of what were to be known as the *Miranda* Rules.<sup>95</sup> According to one unidentified justice who attended the conference, the information that the FBI was already giving suspects a set of warnings resembling what came to be known as the *Miranda* warnings, “was a tremendously important factor, perhaps the critical factor in the *Miranda* vote.”<sup>96</sup>

*Miranda* is probably the most criticized and most misunderstood criminal procedure case in American legal history. Although the warnings are the best known feature of the *Miranda* case, they are not the most important. As Steve Schulhofer has emphasized,<sup>97</sup> *Miranda* contains a series of holdings: (1) informal pressure to speak may constitute “compulsion” within the meaning of the privilege against compulsory self-incrimination; (2) this element is typically present in custodial interrogation; and (3) the now familiar warnings (or some equally effective alternative) are required to dispel or offset the compelling pressures of custodial interrogation. I share Professor Schulhofer’s view that the core of *Miranda* is in the first two steps.

The *Miranda* Court could have *stopped* after the first two steps. It could have said that because the privilege applies to the proceedings in the interrogation room, the old ways of doing things in that room are no longer acceptable, and it is up to Congress and the states or the police departments themselves to devise suitable procedural safeguards. In that event, critics of *Miranda* would not have the warnings to kick around any more and *Miranda* would look less like “legislation” and more like a typical decision. But would that have been preferable?

*Escobedo v. Illinois*,<sup>98</sup> the famous confession case that preceded *Miranda*, declined to establish any concrete guidelines—leaving police, prosecutors and lower court judges in disarray.<sup>99</sup> Why criticize *Miranda* for taking pains to tell law enforcement officials *how* they could continue to question suspects? Would it have been better to let them *guess* about what countermeasures would keep them on the safe side of the constitutional line?

In all the hullabaloo over Warren’s opinion in *Miranda*, everybody seems to have overlooked what dissenting Justice Byron White had to say about utilizing devices other than the warnings in order “to reduce the chances that otherwise

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<sup>95</sup> However, the FBI only advised suspects who could not afford a lawyer of “the availability of such counsel from the Judge.” *Miranda v. Arizona*, 384 U.S. 436, 486 (1966). But a suspect might not see a judge for quite a few hours. On the other hand, the *Miranda* warnings inform one that he has a right to a lawyer (retained or appointed) *before* or *during* questioning. *See id.* at 470, 471, 474, 479. Moreover, as dissenting Justice Harlan observed, “there is no indication that the FBI agents must obtain an affirmative ‘waiver’ before they pursue their questioning.” *Id.* at 521.

<sup>96</sup> SCHWARTZ, *supra* note 6, at 589.

<sup>97</sup> *See* Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 436 (1987).

<sup>98</sup> 378 U.S. 478 (1964).

<sup>99</sup> *Escobedo* extended the right to counsel to the pre-indictment stage, but the scope of the new right was opaque. *See infra* text accompanying notes 114–15.



indiscernible coercion will produce an inadmissible confession.”<sup>100</sup> “Transcripts or observers could be required,” he told us, or “specific time limits” imposed.<sup>101</sup> Where does the Supreme Court get the authority to do that? Ironically, although at one point the *Miranda* majority came to the very edge of requiring law enforcement officers to make tapes or transcripts of the warnings, waiver, and subsequent questioning of custodial suspects,<sup>102</sup> it stopped short of imposing such requirements on police interrogators—probably because it feared that to do so would add much fuel to the criticism that it was exercising undue control over police practices and thus “legislating” a solution.

To back up his argument that “compulsion” within the meaning of the privilege against compulsory self-incrimination can and does take place in the police station, Warren quoted extensively from various interrogation manuals.<sup>103</sup> He was criticized for that.<sup>104</sup> But because of the characteristic secrecy surrounding police interrogation, tapes or transcripts of the events taking place in the interrogation room in the cases before the Court were not available. The interrogation manuals were the “best evidence.” After all, these manuals had been written by those who trained police interrogators or by those who themselves were or had been interrogators. In the kingdom of the blind, the one-eyed person is king.

Of course, Warren himself did not need to read any manuals to find out what went on in the interrogation room. When he observed that “the current practice of incommunicado interrogation is at odds with” the privilege against self-incrimination,<sup>105</sup> and that “an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner,”<sup>106</sup> he could have taken the stand and testified to that effect at considerable length. And when he noted that “the entire thrust of police interrogation [in *Escobedo*], as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment,”<sup>107</sup> he knew firsthand that this was often the case.

It is no accident that Dwight Eisenhower, the president who warned us about the military-industrial complex, was a former five-star general. Nor do I think it an accident that the justice who wrote *Miranda* was a former crime-busting district attorney.

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<sup>100</sup> 384 U.S. at 535.

<sup>101</sup> *Id.*

<sup>102</sup> See *id.* at 475 (“Since the state is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.”).

<sup>103</sup> See *id.* at 448–55.

<sup>104</sup> See *id.* at 499 (Clark, J., dissenting); *id.* at 532 (White, J., dissenting).

<sup>105</sup> *Id.* at 457–58.

<sup>106</sup> *Id.* at 457.

<sup>107</sup> *Id.* at 465.

Shortly after *Miranda* was decided, an angry Congress enacted a statute purporting to “overrule”<sup>108</sup> *Miranda* and to reinstate the old “voluntariness” or “totality-of-the-circumstances” test for the admissibility of confessions—the very test the Warren Court had found inadequate. At various places, the *Miranda* opinion appears to say it is a constitutional decision—an interpretation of the Fifth Amendment’s prohibition against compulsory self-incrimination.<sup>109</sup> It seems fairly clear, therefore, that if the Court had considered the statute’s validity shortly after it was enacted, the statute would have been struck down. But the Court did not address the constitutionality of the anti-*Miranda* statute until three decades had elapsed.

By then, the Burger and Rehnquist Courts’ characterizations of and comments about *Miranda* furnished good reason to believe that the new Court’s thinking about that famous case had changed dramatically since it was first handed down.<sup>110</sup> It began to look as if the statute’s attempt to “overrule” *Miranda* might succeed after all.

But it was not to be. In the year 2000, in the *Dickerson v. United States* case,<sup>111</sup> a 7-2 majority (per Rehnquist, C.J., of all people) said in the first paragraph: “We hold that *Miranda*, being a constitutional decision of the Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves.”<sup>112</sup>

Justice Scalia dissented, launching a scathing attack on *Miranda*. What he found “most remarkable” about the case, and what he believed “made it unacceptable as a matter of constitutional interpretation,” was “its palpable hostility toward the act of confession *per se*, rather than toward what the Constitution abhors, *compelled* confession.”<sup>113</sup> Justice Scalia is only one of a number of people who have made that charge. I think they are all quite wrong. They are confusing *Miranda* with *Escobedo*, overlooking the fact that each of these cases struck a very different tone.

*Escobedo*, which preceded *Miranda* by two years, extended the right to counsel to the police station under *certain* circumstances, but the Court left unclear *what* these circumstances were. Is the right to counsel triggered whenever the criminal “process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession?”<sup>114</sup> Or does *Escobedo* apply only

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<sup>108</sup> The statute purporting to “overrule” *Miranda* is a provision of Title II of the Omnibus Crime Control and Safe Streets Act of 1968, usually known as § 3501 because of its designation under Title 18 of the U.S. Code. See generally Yale Kamisar, *Can (Did) Congress “Overrule” Miranda?*, 85 CORNELL L. REV. 883 (2000).

<sup>109</sup> See 384 U.S. at 430, 445, 457–58, 477, 479, 490–91.

<sup>110</sup> See *Michigan v. Tucker*, 417 U.S. 433 (1974); *New York v. Quarles*, 467 U.S. 649 (1984); *Oregon v. Elstad*, 470 U.S. 298 (1985).

<sup>111</sup> *Dickerson v. United States*, 530 U.S. 428 (2000).

<sup>112</sup> *Id.* at 432.

<sup>113</sup> *Id.* at 449–50.

<sup>114</sup> *Escobedo*, 378 U.S. at 492.

when the criminal process so shifts and one or more of the particular facts in *Escobedo* are also present?

Danny Escobedo could afford a lawyer. He had a lawyer. He asked for his lawyer. His lawyer was at the police station but was not allowed to see him. Very few criminal suspects are able to point to the same facts in their cases.

At some places, the *Escobedo* Court seemed to limit its ruling to the special facts of the case. At other places, however, the opinion contained sweeping language—language which sent shock waves through the ranks of law enforcement—and alarmed many leaders of the bench and bar. For example:

We have learned the lesson of history . . . that a system of criminal law enforcement which comes to depend on the “confession” will, in the long run, be less reliable and more subject to abuse than a system which depends on extrinsic evidence independently secured through skillful investigation . . . .

. . . .

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.<sup>115</sup>

The *Miranda* opinion contains no comparable language. On the other hand, *Miranda* has a twelve-page section responding to the argument that “society’s need for interrogation outweighs the privilege.”<sup>116</sup> In this section, the *Miranda* majority maintains that the experience in some other countries indicates that the danger to law enforcement in placing restrictions on police interrogation is “overplayed” and points out that, despite the fact that its practice has been to give suspects most of the warnings now required by *Miranda*, the FBI has compiled a record of effective law enforcement.<sup>117</sup> *Escobedo* contains no comparable section.

Finally, when the Chief Justice read the *Miranda* opinion from the bench, as one of his biographers has noted,<sup>118</sup> “he interpolated additional clarification plainly intended for police and public:”

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<sup>115</sup> *Escobedo*, 378 U.S. at 488–89.

<sup>116</sup> 384 U.S. at 479–91.

<sup>117</sup> See *id.* at 483–86; see *supra* text accompanying notes 58–59.

<sup>118</sup> CRAY, *supra* note 1, at 460.

"One. We do not outlaw confessions, but permit their use when they are in fact voluntary.

"Two. We do not outlaw police interrogations. We do require proper warnings and full opportunity for assistance of counsel if it is desired.

"Three. We do not restrict the activities of the police in making on-the-scene investigations of crime and in interrogating witnesses in the vicinity."<sup>119</sup>

In the wake of *Escobedo* many feared that the Court might be in the process of shaping "a novel right not to confess except knowingly and with the tactical assistance of counsel."<sup>120</sup> *Miranda* put these fears to rest.

On the eve of *Miranda*, Judge Henry Friendly warned that "condition[ing] questioning on the presence of counsel is . . . really saying that there may be no effective, immediate questioning by the police and this is a rule that society will not long endure."<sup>121</sup> We shall never know how long society would endure such a rule, because the Warren Court never promulgated such a rule.

*Miranda* does not condition custodial questioning on the presence of counsel. It conditions it rather on the giving of warnings by the police. It allows the police to obtain waivers of a custodial suspect's rights *without* the advice or presence of defense counsel, *without* the advice or presence of a judicial officer, and *without* the police having to make any objective record of the proceedings.

It is regrettable that it took the Burger Court so long—a full twenty years—to recognize that *Miranda* was a compromise. Finally, in 1986, a majority of the Burger Court did say, "rather than proceeding from the premise that the rights and needs of the defendant are paramount to all others, [the *Miranda* decision] embodies a carefully crafted balance designed to fully protect both the defendant's and society's interests."<sup>122</sup>

Even today it is regrettable that—four decades after *Miranda* was handed down—most Americans still have no notion of the extent to which *Miranda* is a compromise.

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<sup>119</sup> *Id.* Similar language appears in the *Miranda* opinion itself. See 384 U.S. at 477–78. For example, Warren indicated that because "the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present," the police could question suspects in their own homes or places of business without giving them the *Miranda* warnings. *Id.* at 478 n.46.

<sup>120</sup> See Arnold N. Enker & Sheldon H. Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 91 (1964); see also WALTER V. SCHAEFER, *THE SUSPECT AND SOCIETY* 9 (1967) (noting, in lectures written two months before *Miranda*, that "the doctrines converging upon the institution of police interrogation are threatening to push on to their logical conclusion—to the point where no questioning of suspects will be permitted").

<sup>121</sup> *Forty-Third Annual Meeting of the American Law Institute*, 1966 A.L.I. PROC. 250 (remarks of Judge Friendly).

<sup>122</sup> *Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986); see also *id.* at 426–27.

VI. *TERRY V. OHIO*

Earl Warren stepped down from the Supreme Court in June 1969. But the so-called revolution in American criminal procedure had already ended. It had done so a full year earlier when the Court handed down its opinions in the “stop-and-frisk” cases—*Terry v. Ohio*<sup>123</sup> and two companion cases.

Warren’s opinion in *Terry*, upholding the police practice of “stopping” and “frisking” suspects on less than traditional “probable cause” to believe the suspects were engaged in criminal activity, must have surprised many of the Chief Justice’s “law and order” critics. Of all the opinions Warren wrote in his decade and a half on the Court, his opinion in *Terry* best demonstrates his kinship with the police and his concern for their safety.

The first *Terry* draft opinion that Warren circulated to his colleagues provides even stronger evidence of his belief that police had the need—and the right—to take what he considered “common sense” efforts to protect themselves from danger. At one point in the draft, he stated: “[A] police officer is not required to sacrifice his life on the altar of a doctrinaire judicial scholasticism which ignores the deadly realities of criminal investigation and law enforcement.”<sup>124</sup>

But perhaps one should not make too much of Warren’s role in *Terry*. The person who wrote *Terry* seems to be quite different from the person who wrote *Miranda* and the person who joined the opinion of the Court in *Mapp*.

The opinion in *Mapp* had emphasized the need for and the importance of the search and seizure exclusionary rule. In *Terry*, however, Warren underscored the limitations of the rule.<sup>125</sup> Warren’s opinion in *Terry* also differs sharply from his opinion in *Miranda*, decided two years earlier. In *Miranda*, Warren and his liberal allies sought to replace the unruly, subjective, and largely unworkable “voluntariness” test with the more manageable *Miranda* rules. But *Terry* utilized such a spongy standard, one that allowed the police so much discretion and provided the courts so little basis for meaningful review, that it must have been cause for celebration in more than a few precinct stations throughout the land.<sup>126</sup>

What had happened between the time of *Miranda* and *Terry*?

After discussing various possibilities, Francis Allen concludes (and I share his view) that “surely the most fundamental reasons for the Court’s loss of impetus lies in the social and political context of the Court in the late 1960s”.<sup>127</sup>

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<sup>123</sup> 392 U.S. 1 (1968). See generally Wayne R. LaFave, *Street Encounters and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40 (1968); Symposium, *Terry v. Ohio 30 Years Later*, 72 ST. JOHN’S L. REV. 721 (1998).

<sup>124</sup> SCHWARTZ, *supra* note 6, at 688.

<sup>125</sup> See 392 U.S. at 13.

<sup>126</sup> At one point, Warren stated for the *Terry* majority that an officer could frisk a person when he “observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the person with whom he is dealing may be armed and presently dangerous.” *Id.* at 30.

<sup>127</sup> Allen, *supra* note 41, at 538–39.

That period was a time of social upheaval, violence in the ghettos, and disorder on the campuses. Fears of the breakdown of public order were widespread. Inevitably, the issue of law and order was politically exploited. In the presidential campaign of 1968 the bewildering problems of crime in the United States were represented simply as war between the "peace forces" and the "criminal forces." . . . *Miranda* evoked a chorus of criticism of the Court ranging from the excited to the psychotic. Congress responded with the . . . Safe Streets Act of 1968, some provisions of which were obviously retaliatory. These events combined to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court's mission in criminal cases.<sup>128</sup>

#### VII. A FINAL COMMENT

Since the Warren Court's revolution in criminal procedure came to an end, most of the famous cases that marked the revolution have been misunderstood by the public; disparaged, even ridiculed, by politicians and members of the media; and read narrowly, applied grudgingly, and riddled with exceptions by the Burger and Rehnquist Courts.

But the original, unadulterated versions of these cases are in the books Chief Justice Warren loved—the bound volumes of the U.S. Supreme Court Reports. Let posterity decide who was right!

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<sup>128</sup> *Id.* at 539. Professor Allen also suggests that there may be "something inherent in the judicial process" that makes it difficult for a court to promulgate broad categorical rules requiring judges to "ignore apparently substantial social costs in the form of frustrations of law enforcement in the particular cases under scrutiny." *Id.* at 538.